No. 722

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,145

GEORGE A. LANDELL, Executor, *et al.*,
Petitioners-Appellants,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent-Appellee.

ANSWER TO "PETITION FOR REHEARING BEFORE THE FULL COURT OR IN THE ALTERNATIVE FOR MODIFICATION OF OPINION"

The present petition represents the fourth attempt by appellants to obtain a reversal by this Court of a judgment of the District Court dismissing for laches a complaint which seeks to recover in respect of transactions occurring more than half a century before it was filed. We submit that the petition is utterly without merit and should be dismissed.

The previous proceedings may be thus briefly summarized:

In this litigation, not commenced until 1950, minority stockholders of the Northern Pacific Rail*road* Company sought in substance to annul a foreclosure and reorganiza-

tion pursuant to which all of the properties and franchises of the Railroad Company were acquired by the present appellee Northern Pacific Rail*way* Company. These acquisitions were completed during the period 1896-1899 under decrees of the former United States Circuit Court for the Eastern District of Wisconsin, pursuant to a reorganization plan open to all stockholders of the old Railroad and accepted by the overwhelming majority of them. The present appellants appear to represent the descendants of the small minority of the old Railroad stockholders who refused in 1896 to participate in the reorganization.

The respondent-appellee Northern Pacific Railway Company moved in the District Court under Rule 56 for summary judgment on the ground of (1) the statute of limitations and (2) laches. This motion was supported by:

> (a) The deposition of Robert W. Lishman, counsel for and one of the petitioners-appellants, taken at the instance of the Railway.
>
> (b) Exhibits (coming largely from petitioners' own files) introduced in connection with that deposition and establishing, *inter alia,* that petitioners or their predecessors had full knowledge or were on notice of the facts underlying their present claims for something like half a century before the present action was brought.
>
> (c) Affidavits setting forth the substantial changes which have taken place since 1896 with respect to the affairs and property of the respondent Rail*way* Company, and establishing the death of every participant in the transactions under attack.

District Judge Tamm, in an opinion dated June 23, 1954, and characterized by this Court as "careful and exhaustive", granted respondent Railway's motion and

dismissed the complaint on the ground of laches (122 F. Supp. 253). Petitioners appealed.

In a short *per curiam* opinion dated April 14, 1955, this Court (Circuit Judges Prettyman, Bazelon and Bastian) affirmed (96 U. S. App. D. C. 24, 223 F. 2d 316). Petitioners then filed under date of April 28, 1955, a "petition for rehearing before the full court, or in the alternative, for modification of opinion", in which they raised substantially the same grounds which they had unsuccessfully argued upon the appeal, and which they now seek to raise again. The petition, in so far as it sought a modification of the opinion, was denied by Circuit Judges Prettyman, Bazelon and Bastian by order dated May 11, 1955. The petition, in so far as it sought a rehearing before the full court, was denied by the full bench (except Chief Judge Stephens, who did not participate) by order dated May 11, 1955, and amended May 25, 1955.

Petitioners then sought certiorari, which was denied on October 10, 1955 (350 U. S. 844).

They then petitioned the Supreme Court for rehearing of that denial. In their petition for rehearing they repeated their previous arguments and added a parallel column tabulation of the alleged "erroneous statements in Judge Tamm's opinion", plus their own comments. The Supreme Court denied the petition for rehearing on November 21, 1955 (350 U. S. 905).

On November 23, 1955, following the final disposition of the case in the Supreme Court, there was entered on the docket of the District Court an order on the mandate of this Court affirming the judgment of the District Court dismissing the complaint, with costs.

Five days later, on November 28, 1955, petitioners attempted to start the litigation all over again in the District Court, by a motion purporting to be made under Rule

60(b)(6) to "set aside, vacate, modify or correct" the judgment of dismissal, coupling with this a motion to review the taxation of costs. In the papers which they submitted in the District Court they set forth the same parallel column tabulation of the alleged "erroneous statements in Judge Tamm's opinion" which they had unsuccessfully presented to the Supreme Court as noted above.

Their motion was denied by Judge Tamm from the bench on December 21, 1955, without opinion.

Petitioners then presented their second appeal to this Court, from Judge Tamm's order of December 21, 1955.

On October 11, 1956, this Court (Circuit Judges Prettyman, Bazelon and Bastian) thus disposed of the second appeal:

> "PER CURIAM: This case is here a second time. The District Court (Judge Tamm) originally held the action barred by *laches*, rendering a careful opinion upon the point.[1] Landell appealed, and this court affirmed.[2] Certiorari was sought but was denied.[3] The mandate of this court issued, and the District Court entered judgment upon it. In doing so it assessed costs. Landell appealed from that judgment, using as procedural justification the feature of costs. Once here, however, he bases the merits of the appeal upon alleged flaws in the findings and other premises upon which the original judgment was based. Those questions are no longer open. Of course a judgment in the posture of this one may be attacked for fraud in its procurement. While appellant clothes his attack in language appropriate to such an issue, no fact remotely suggesting any such infirmity in the present judgment appears here.

[1] 122 F. Supp. 253 (1954).
[2] 96 U. S. App. D. C. 24, 223 F. 2d 316 (1955).
[3] 350 U. S. 844, 100 L. Ed. 61, 76 S. Ct. 85 (1955).

> The order of the District Court upon the mandate of this court is
>
> *Affirmed.*"

The present petition followed.

Argument

Nothing new or worthy of note is to be found in the present petition. All of the arguments which it contains have been dealt with in one or more of our previous briefs. All of them have been fully considered and rejected by all the courts which have passed upon all the previous applications. Indeed, practically all of those arguments, as shown by the record on the first appeal, are mere repetitions of claims which the petitioners or their predecessors have been unsuccessfully pressing upon Congress, the Executive Departments and the Courts at sporadic intervals over the last sixty years. We submit that the time has now come to call a halt.

On December 22, 1955, in connection with their second appeal, petitioners filed a motion to recall and stay the mandate, which was denied *per curiam* by this Court under date of January 6, 1956. In our answer and objections to this motion, under date of December 28, 1955, we said:

> "Defendant-appellee further respectfully gives notice, pursuant to Rule 23 of the General Rules of this Court, that the appeal now taken by plaintiffs-appellants from Judge Tamm's order of December 21, 1955, appears to have been sued out merely for delay, and that if said appeal is not dismissed before argument defendant-appellee will claim the additional damages and double costs contemplated by said Rule."

The groundless second appeal which this Court summarily rejected on October 11, 1956, followed by the present equally groundless petition, have imposed needless burdens upon this Court, and added expenses upon the respondent-appellee. In accordance with Rule 23, and pursuant to our notice previously given, we accordingly respectfully submit (1) that the present petition should be denied and (2) that double costs should be imposed upon petitioners-appellants.

Dated: October 30, 1956.

Respectfully submitted,

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FILED
FEB 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 722.

GEORGE A. LANDELL, *et al.*,
Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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February 11, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 722.

GEORGE A. LANDELL, *et al.*,

Petitioners,

v.

NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Question Presented.

The sole question here is how long petitioners should be permitted to burden the courts with a relitigation of a sixty-year old claim which has already been twice presented and rejected on the ground of laches in the District Court, in the Court of Appeals and in the Supreme Court of the United States. Respondent submits that the present petition is utterly without merit and should be denied.

Statement.

This is an attempt, by way of a second appeal and a second petition for certiorari, to relitigate matters which

have already been fully considered and decided against petitioners in all courts.

Respondent's position is fully set forth in our brief in opposition to the former petition for certiorari (No. 299, October Term 1955, petition denied October 10, 1955, 350 U. S. 844, rehearing denied November 21, 1955, 350 U. S. 905). We refer to that brief for a full statement of the facts and supporting record citations, which may be shortly summarized as follows:

The Northern Pacific Rail*road* Company was incorporated by Act of Congress of July 2, 1864 (13 Stat. 365). After extricating itself with some difficulty from insolvency following the panic of 1873 the Rail*road* again fell into financial difficulties in the panic of 1893 and defaulted on some of its bond issues. A receivership followed.

In 1896 a reorganization took place, pursuant to a plan of reorganization and foreclosure decree in the United States Circuit Court for the Eastern District of Wisconsin. That plan included a provision—open to all stockholders—for the exchange, share for share, of old Rail*road* stock for new Rail*way* stock upon payment of $10 for each share of preferred and $15 for each share of common. Substantially all the bondholders, and over 95% of the stockholders, joined in the reorganization plan. The present petitioners appear to represent the descendants of the small minority of old Railroad stockholders who refused to participate in the 1896 reorganization.

Under that reorganization and foreclosure, the assets of the old Railroad were acquired by the present respondent Northern Pacific Rail*way* Company, the major portion of the assets being acquired under the main foreclosure decree of 1896 and the balance under a supplemental decree of 1899.

In 1897 President Cleveland's Attorney General rendered a formal opinion to the Secretary of the Interior

holding that the new Rail*way* Company was the successor to the old Rail*road* and should be treated as such in respect of applications for patents under the original land grant by Congress (21 O. A. G. 486).

In 1898, following protests made as early as 1896, the predecessors of the present petitioners formed a Stockholders Protective Committee.

In 1900 a representative stockholders' suit was begun in the United States Circuit Court for the Southern District of New York by one Joseph Hoover, attacking the 1896 foreclosure and reorganization upon substantially the same grounds as are involved in the present case. Hoover had been active in the protests made by representatives of the Stockholders Committee. His counsel were the same individuals who were the counsel for the Committee, and looked to the Committee for instructions and guidance.

After some sporadic activity at the start, the *Hoover* case was allowed to lapse into oblivion. In 1906, 1909 and 1914 petitioners' counsel were unequivocally warned that the defense of laches would be interposed. Despite these warnings they did nothing and in 1938 the *Hoover* case was dismissed for failure to prosecute. A motion to restore it to the calendar, made by the predecessor of the present counsel for petitioners, was denied in 1939 for "inexcusable laches".

During the early part of the present century, the present petitioner Committee engaged in a campaign before Congress and elsewhere attacking the 1896 foreclosure and reorganization. Their efforts were uniformly unsuccessful. In 1904 they attempted to have the Attorney General overrule his predecessor's 1897 opinion. In that connection the predecessor of their present counsel submitted to the Attorney General briefs which made substantially the same arguments as appear in the present petition. The result

was another formal opinion of the Attorney General (25 O. A. G. 401), affirming the action of his predecessor and holding that the Rail*way* was the successor of the Rail*road*.

In the 1930's representatives of the petitioner Committee attempted to intervene in the *Land Grant* case between the United States and the Rail*way*. These attempts were likewise unsuccessful (102 F. 2d 589, 595-6). They were equally unsuccessful in their attempts to appear in this Court when the *Land Grant* case was argued here (309 U. S. 626, 311 U. S. 613). Thereafter for about a decade the Committee appeared to be semi-moribund; and for over 30 years it has sent no circulars of advice to the minority shareholders whom it claims to represent.

In 1950 petitioners brought the present action in the United States District Court for the District of Columbia. The substance of their complaint is the same as that which they and their predecessors had been unsuccessfully making off and on for the previous half century. They allege that the 1896 reorganization and foreclosure were illegal and void, and that six of the mortgages placed upon the old Railroad's property between 1879 and 1889 and aggregating more than $100,000,000 were likewise illegal and void.

Defendant-respondent Railway answered the complaint and proceeded to take the deposition of the principal plaintiff-petitioner, Mr. Robert W. Lishman, who is also counsel for plaintiffs-petitioners. In connection with Mr. Lishman's deposition there were marked as exhibits a number of documents—bearing on the issue of laches—coming chiefly from the petitioners' own files. On the basis of that deposition and those documents (plus three affidavits establishing the death of all those concerned in the 1896 transactions and the subsequent changes which have occurred in the Railway's position and properties), the Railway moved for

summary judgment under Rule 56 on the grounds of (1) statute of limitations and (2) laches.

On June 23, 1954, the District Court (Judge Tamm), in an opinion characterized by the Court of Appeals as "careful and exhaustive", dismissed the complaint for laches and found it unnecessary to pass upon the question of limitations (122 F. Supp. 253).

Petitioners appealed. On April 14, 1955 the Court of Appeals for the District of Columbia Circuit unanimously affirmed *per curiam* (96 U. S. App. D. C. 24, 223 F. 2d 316).

Petitioners then filed a "petition for rehearing before the full court, or in the alternative for modification of opinion". This was denied without opinion on May 11, 1955.

They then petitioned for certiorari, which was denied on October 10, 1955 (350 U. S. 844).

They then petitioned for rehearing of that denial. That petition was denied on November 21, 1955 (350 U. S. 905).

On November 23, 1955, following the final disposition of the case here, there was entered on the docket of the District Court an order on the mandate of the Court of Appeals affirming the judgment of the District Court with costs.

Five days later, on November 28, 1955, petitioners started all over again in the District Court with an attempt to persuade that Court that its own prior decision, the affirmance of that decision by the Court of Appeals and the denial of certiorari by this Court were all wrong. They did this by a motion purporting to be made under Rule 60(d)(6) to "set aside, vacate, modify or correct" the summary judgment dismissing the complaint for laches.

This motion was argued in the District Court on December 21, 1955, and was denied from the bench without opinion.

Petitioners then appealed for a second time to the Court of Appeals. On October 11, 1956, that Court disposed of the second appeal with a *per curiam* affirmance (App. B to petition, p. 31).

Following the same line as on their former appeal, petitioners then asked the Court of Appeals "for rehearing before the full Court or in the alternative for modification of opinion." This application was denied *per curiam* without opinion on November 2, 1956. The present petition for certiorari then followed.

Argument.

In our brief in opposition to the former petition for certiorari, after setting out in more detail the facts summarized above (minus, of course, the subsequent proceedings on the second appeal) we said

> "What the facts set out above demonstrate—and what petitioners indeed now admit—is simply this: they or their predecessors have known all about their present claims for at least half a century but have deliberately refused to bring suit until every participant and witness had died and the position of the respondent had changed beyond recognition. This situation, entirely of petitioners' own making and scarcely a reason why the docket of this or any other court should now be burdened with their claims, is entirely unique. To our knowledge there is no other reported case involving laches in which the facts were so extreme or in which the decision seems less likely to serve as a precedent."

That statement is as true now as it was then. All of the arguments now advanced by petitioners were presented and fully considered by the courts on the first appeal and first petition for certiorari. Most of them, including par-

ticularly the "public interest" claim, are the same as the arguments which were rejected by President Cleveland's Attorney General in 1897, by President Theodore Roosevelt's Attorney General in 1905, by Congress in 1908 (App. 477-87 of record in No. 219, Oct. Term 1955) and by the courts which denied the attempted interventions in the *Land Grant* case in the period 1938-40.

We submit that no conceivable basis has been shown for the granting of certiorari or for the interminable protraction of this litigation by successive appeals. The present petition is in substance nothing more than a second petition for rehearing of the former application, contrary to the spirit, if not the letter, of Rule 58(4) of the Rules of this Court.

Conclusion.

The petition should be denied.

Dated: February 11, 1957.

Respectfully submitted,

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MOTION FILED MAY 29 1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 722

GEORGE A. LANDELL, Executor, et al., *Petitioners,*

v.

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(A) Motion for Leave to File Petition for Rehearing

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, filed February 25, 1957 (352 U.S. 1017). Rehearing is sought at this time, because as is pointed out more fully in the annexed petition, the Court, in *United States* v. *Union Pacific Railroad Company,* filed April 8, 1957 (353 U.S. 112), made a new decision which should control the present case. Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after such time; and the Court clearly has power, in its discretion, to entertain the petition. *Roberts Sash & Door Co.* v. *United States,* 282 U.S. 829; *Duquesne Steel Foundry Co.* v. *Burnet,* 282 U.S. 830; *Douglas* v. *Willcuts,* 295 U.S. 722; *United States* v. *Ohio Power Co.,* filed April 1, 1957, 353 U.S. 98.

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ROBERT W. LISHMAN,
Counsel for Petitioners

Dated: May, 1957

(B) Petition for Rehearing of Order Denying Petition for Writ of Certiorari

Reasons for Granting Rehearing and Issuing the Writ

1. *United States* v. *Union Pacific Railroad Company,* decided by this Court on April 8, 1957, is a new case which decides identical or similar issues contrary to the decision in the present case. The subject of the litigation in the *Union Pacific* case was the nature of the title to, and the parties' interest in, certain portions of the right-of-way. The decision in the present case denies petitioners the opportunity of a day in court to litigate the same or similar issues.

a. If there is to be uniformity of decision and of application of the principles announced in the *Union Pacific* case, the order of February 25, 1957, denying the petition for writ of certiorari in this case cannot stand. See *United States* v. *Ohio Power Company,* 353 U.S. 98, where this Court granted petition for rehearing, vacated the order denying certiorari, granted the petition for certiorari and reversed the judgment below. In doing this, the Court stated that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."

b. The pertinent issues decided, and principles applied, in the *Union Pacific* case are as follows:

(1) The title to, and the nature of the parties' interest in, the 1862 right-of-way grant are now susceptible of judicial construction.

(2) The interest of the grantee in the right-of-way is subject to the restrictions in the grant. The grantee does not have a fee simple interest in the right-of-way lands. The grantor has a superior interest in the minerals thereunder and can enforce the obligations in the grant and the restrictions imposed upon the right-of-way.

(3) The obligations and the right-of-way restrictions in the grant are of a current and continuing nature.

(4) The Union Pacific Railroad Company, a Utah corporation (which succeeded to the original federal corporation grantee by means of an 1880 reorganization) is subject to and bound by the obligations and restrictions contained in the grant of 1862. The reorganization did not serve to give it any greater interest in the right-of-way lands than that of its predecessor nor to relieve it from the obligations imposed upon its predecessor.

c. In the present case the decision and principles applied are flatly contrary to those announced and applied in the *Union Pacific* case. The identical or similar issues in the present case which were decided contrary to the decision and principles announced in the *Union Pacific* case, are as follows:

(1) The present case decides that the title to, and the nature of the parties' interest in, the right-of-way lands granted by the Act of July 2, 1864, 13 Stat. 365, are not now susceptible of judicial construction. The present decision, despite the fact that the federal statute places no time limit upon the rights inherent in the stock certificates of the federal corporation, determines that passage of time without institution of suit, precludes resort to judicial intervention to ascertain the nature of the majority stockholder's statutory interest in the right-of-way and of the minority stockholders' statutory interests therein.

(2) The present case decides that the grantee's interest in the right-of-way is not subject to the restriction in the grant.[1] In this connection, it should be noted that the

[1] The statute provides current and continuing property rights for the petitioners in the right-of-way. The grant contains nonassignable covenants and restrictions to preserve their interests. Congress has on three occasions refused to consent to the assignment of the federal corporation to respondent free from the force of these obligations. Petitioners contend that the courts have no jurisdiction to make the present decision, which modifies and repeals essential provisions in a statute, despite the refusals of Congress to do so.

Northern Pacific grant contains specific prohibitions not present in the Union Pacific grant.

Section 10 of the Northern Pacific grant provides that:

> " . . . no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States."

Section 3 of the grant forbids the grantee to consolidate the road with any other railroad except under specified conditions by which the federal corporation would always be the assignee and never the assignor. This Court has affirmed a Circuit Court of Appeals opinion stating that this restriction was to:

> " . . . mark one of the primary objects and insure the accomplishment of one of the great purposes, of the charter, namely, that a single corporation, the corporation created by that charter, should, in the end, own and operate a continuous railroad from Lake Superior to Puget Sound, . . ." (*United States* v. *Northern Pacific Railroad Company,* 8 Cir., 1899, 95 Fed. 864, 876, affirmed 177 U.S. 435).

The obligations and restrictions in the *Northern Pacific* grant run to the grantor and to the original stockholders and their successors. The United States' interest in the obligations and restrictions is to preserve the continuity of the main line of federal railroad in an operating corporation subject to the direct and reserved power of Congress. The Act and its legislative history shows that the United States was also interested in having the federal railroad corporation financed by the people of the United States as stockholders and by the grant of lands to aid construction. The stockholders' interest is that the same statutory prohibitions concurrently protect their property rights.

The decision in the *Union Pacific* case holds that a right-of-way restriction may be enforced by one of the

parties to the grant. The decision in the present case holds that petitioners, who are parties to a similar grant, may not enforce a similar restriction.

(3) The present case holds that the grantee's obligations and the prohibitions limiting the grantee's title in and use of the right-of-way are not of a continuing nature and do not run with the land. The present case treats the obligations and prohibitions as having only a temporary force which was spent in 1896 or shortly thereafter. By applying the doctrine of laches the District Court has exercised a revisory legislative power.

(4) The present case holds that respondent, the Northern Pacific Railway Company, the alleged successor to the original grantee, is not bound by the obligations and prohibitions contained in the grant. The reorganization in the present case, unlike that in the *Union Pacific,* is held to give respondent the right-of-way lands free from the prohibition against mortgaging without the consent of Congress.

In the present case the existing federal corporation grantee, for itself, its successors and assigns, in accordance with section 12 of the Act of July 2, 1864, duly accepted in writing "the terms, conditions and impositions" of the grant. The rationale of the present decision is that such acceptance was meant to bind the original grantee alone; that by means of a consent decree conveyance the 97% stockholder of the federal corporation has acquired the right-of-way free from the prohibitions in the grant. This constitutes judicial legislation.

Respondent in its answer in the present case, after alleging that it was the successor of the federal corporation by virtue of the consent foreclosure decree of April 27, 1896, alleges that it is not bound by the prohibition against mortgaging imposed upon the right-of-way. Respondent in paragraph LX of its answer alleges that the

laws of Wisconsin enable it to do what the federal grant prohibits. This makes a state statute paramount to the plain command in a federal statute.

The theory followed in the present decision, that respondent as a "successor and assign" of the original grantee is not bound by the prohibition against mortgaging the right-of-way, is shown in paragraph LI of the answer. Respondent there alleges (Record p. 104, 1st petition for certiorari):

> " . . . that by said Act of July 2, 1864, the right-of-way and lands therein mentioned were in terms granted to 'said "Northern Pacific Railroad Company", *its successors and assigns'*, and that the provisions of said act restricting the power of the corporation created thereby to issue bonds or to create liens on its property were not made applicable to or intended to govern any successor to the properties of said company, or any assignee thereof."

In *Oregon Ry. and Navigation Co.* v. *Oregonian Ry. Co., Ltd.*, 130 U. S. 1, 30-33, this Court determined that the presence of the words "successors and assigns" do not authorize an assignment whereby the assignee escapes the continuing obligations contained in a railroad charter and grant. The present decision nullifies the nonassignability safeguard which Congress expressly provided for the original stockholders and their successors.

In the *Union Pacific* case, the grantee's successor was held bound by the restrictions in the grant. The present case decides that whether the restrictions contained in the Northern Pacific right-of-way grant are binding upon the successor is a question which cannot be litigated by the petitioners.

2. The Court, if it determines that the present case should be controlled by the decision and principles announced in the *Union Pacific* case, or that it should be reversed in the interests of justice, would not be confronted

with the policy that litigation must at some time become final.

a. According to the *Union Pacific* case the present decision that the restrictions upon the Northern Pacific right-of-way are not enforceable would not apply to an action by the United States. According to *Ashwander et al.*, v. *T.V.A.*, 297 U. S. 288, 319-322, the petitioners, as stockholders, could maintain a bill in equity to protect the interests of the federal corporation against what is asserted to be a present, illegal use of its property. The dismissal for laches of the suit against respondent as 97% stockholder, should not bar the minority from maintaining a bill against the federal corporation, its officers and directors to discover assets. Stockholders in an existing corporation, under any theory of law, are entitled to ascertain if their company has assets, the source of the funds which keep it alive as a going concern, the purpose underlying its continued existence, its receipts and expenditures and the nature of its activities.

b. There has been no hearing, trial or decision on the merits. There has been no change in the fact that petitioners and respondents are each stockholders in the federal corporation. Meetings of the federal corporation's stockholders have been held since the decision herein. The terms of the federal charter and grant remain unchanged.

c. As stockholders, petitioners have the right to ascertain whether the assets of the corporation are being used by another without payment therefor to the corporation. Section 13 of the Act of July 2, 1864 requires the directors to make annual reports of their proceedings and expenditures verified by the president and at least six of the directors. Petitioners also have the right to compel their corporation, its officers and directors to assert its property interest in the matter. In such a suit respondent could not successfully claim, as it has in the present case, that

Wisconsin law gives it the authority to make free use of the federal corporation's charter, franchises and right-of-way. See *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307, 322, where the broad equitable principle is applied, that the doctrine of corporate entity will not be regarded when to do so would work injustice, and permit a parent corporation to manipulate the assets of a subsidiary in disregard of the rights of other stockholders in the subsidiary.

d. Since the right-of-way lands were not, under any act of Congress, capable of being conveyed from the federal corporation to the respondent, its 97% stockholder, the validity of the conveyance is always open to an action at law by stockholders of the federal corporation whose proprietary interest in the right-of-way is derived from the same statute as that from which respondent must derive its interest. See *Burfenning* v. *Railway Co.*, 163 U. S. 321; also *Doherty* v. *Northern Pacific Railway Company*, 177 U.S. 421, 428, where this Court stated that Northern Pacific Railway Company, the respondent herein, claimed its right-of-way title interest was founded directly upon the Act of July 2, 1864. The Court said, "It is not claimed that this right of way was acquired by purchase or condemnation, but it is claimed by virtue of the terms of the Act of Congress, approved July 2, 1864, incorporating the Northern Pacific Railroad Company, and granting to it, among other rights and privileges, a right of way through the public lands of the United States." The prayer in the complaint in the present case, which was ignored in the summary judgment decision, was to have the court adjudge, as the Court did in the *Union Pacific* case, that respondent's interest in the right-of-way was limited to the interest provided in the underlying Act of Congress and that both respondent and petitioners had pro rata property interests therein.

e. No court or administrative agency has constitutional power to interfere with the exercise of the plenary

power of Congress in its appropriation of public lands to a particular grantee. If petitioners establish that legal title to the right-of-way lands is in the federal corporation, they are entitled, under many decisions of this Court, to hold the respondent as trustee of the title for the benefit of the federal corporation to whom Congress appropriated the lands.

f. The essential elements alleged in the complaint, which the present decision obliterates with an irrelevant discussion of fraud and the laches applicable thereto, is that the charter, franchises and right-of-way cannot be acquired or enjoyed by respondent because they are non-assignable without the consent of both Congress and the minority stockholders (Complaint, paragraphs VII, LI, LII, LIV, Record, first petition for writ of certiorari, pp. 6, 33, 35). See *Central Transportation Co.* v. *Pullman's Palace Car Co.,* 139 U. S. 24, 41, 44, 48, 49, 59, which holds that a railroad charter, franchise, and right-of-way cannot be transferred without both such consents. The 1896 reorganization was a procedure whereby respondent acquired the federal corporation's assets of the agreed value of $345,000,000 (more than enough to satisfy all liabilities and reach the petitioners) without obtaining the consent of either the United States or the minority stockholders to the transfer of the non-assignable assets. Norris Darrell, Esquire, in *The Use of Reorganization Techniques in Corporate Acquisitions,* 70 Harv. L. Rev. 1183, 1197, 1199 (May 1957), points out that, in the asset acquisition technique of corporate reorganization, the law requires the obtaining of consent to the assignment of non-assignable, burdensome contracts and franchises of the acquired corporation.

The District Court's first decision in this case, by another judge, was founded upon the principle that, respondent as 97% stockholder could not lift itself by its own bootstraps into the position of owner of the charter,

right-of-way and franchise of the federal corporation (98 F. Supp. 479, 480-482). The first decision, which should have been the law of this case, recognized that non-assignable assets were incapable of transfer without the obtaining of the necessary consents.

The fact that the complaint alleges respondent has fraudulently hindered the institution of effective litigation against it, has been erroneously treated by the summary judgment as being allegations of a cause of action founded upon fraud. The haste of the summary judgment technique has smothered the true cause of action—that respondent is now unlawfully enjoying non-assignable assets—and left in its wake confusion and injustice. See, *infra*, p. 18.

3. The decision and principles announced in the *Union Pacific* case are contrary to and inconsistent with the present decision that respondent is entitled to a summary judgment dismissing the complaint for alleged laches.

a. Implicit in the *Union Pacific* case is cognizance of the law that a reorganization conveyance cannot nullify the present force of statutory obligations, nor give a better title to the purchaser than that of the mortgagor.

The decision in the present case to the contrary is remarkable. The basic title questions present in the complaint were side-tracked and a decision made on the theory that the issue was whether plaintiffs were barred by laches from obtaining relief for an ancient fraud. This theory is contrary to the pleadings. In the present case it was alleged in the complaint that Congress on three occasions refused to authorize transfer of the right-of-way or to terminate, or to vary the restrictions imposed upon the right-of-way and refused to give respondent authority to mortgage it. The complaint asserted the incompetency of the federal corporation to transfer its charter, right-of-way and franchises to respondent and the incompetency of the respondent to receive them in the

absence of Congressional authorization. This theory was not one of fraud.

During the 1896 reorganization of the federal corporation, respondent caused three bills to be introduced authorizing respondent to become the lawful successor at the pending foreclosure sale to the charter powers, franchise, right-of-way and other statutory assets of the federal corporation. Each bill also authorized respondent to place a mortgage upon the right-of-way and franchise. These bills were S. Res. 124, H. R. 168 and H. R. 190, all in the 54th Congress, 1st Session. None of these bills passed. In the Union Pacific reorganization Congress passed legislation enabling the Utah Railroad Company to become successor to the federal corporation.

Respondent's witnesses testified before the House Judiciary Committee with respect to H. R. 168, that without enabling legislation, respondent, a Wisconsin corporation, could not lawfully acquire title to the charter, right-of-way or franchise of the federal corporation at the then pending foreclosure sale (Record p. 184, first petition for certiorari).

Despite failure to obtain the enabling act, respondent went ahead and purported to acquire the charter, right-of-way and franchise at the consent sale.

The consent foreclosure decree of April 27, 1896, however, in paragraph XXIV reserves and leaves undetermined the issue duly raised by an intervener, whether the mortgage then being foreclosed against the right-of-way and railroad franchise was a nullity because it had not been authorized by Congress as required by section 10 of the Act of July 2, 1864. Conveyances of the right-of-way and franchise to respondent pursuant to the decree keep this reservation open and undetermined (Record pp. 21, first petition for certiorari). This, of course, prevents any successful claim of title by reason of open and notorious adverse possession, as of right, to the railroad charter, franchise and right-of-way.

At no time has Congress authorized respondent to succeed to the federal corporation or to have title to the railroad franchise or right-of-way. Thus in 1898 Congress by law refused to recognize the validity of the 1896 foreclosure (Act of July 1, 1898, 30 Stat. 597, 620).

By section 4 of the Act of June 26, 1929, c. 41, 46 Stat. 41, Congress provided that the act "shall not be construed as affecting the present title of the Northern Pacific Railroad Company, or its successors, . . ." Respondent was afforded a limited protection "in the right of way of said road or lands actually used in good faith . . . in the operation of said road."

At the time respondent, 97% stockholder of the federal corporation, caused its assets to be transferred to respondent in exchange for respondent's paper securities, the petitioners were also stockholders of the federal corporation. No provision was made for the minority shareholders, who were not parties to the proceedings, although the assets were ample to reach them.

Respondent stated that the old federal corporation is a shell [2] and is kept alive because the federal statutes do not provide a way to wind up a federal corporation. This theory overlooks the fact that respondent itself has successfully opposed petitioners' attempts to secure a legislative dissolution of the federal corporation. The

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[2] Respondent's counsel told the District Court that: "Since 1896 the Northern Pacific Railway Company has held just over 97% of the stock of the old Railroad. The old Railroad has had literally no property whatever since the period 1896 to 1899. It exists as a shell. It has nothing but a board of directors which meets annually. Why is it still around? Well, the reason which has been publicly stated before is that there is apparently no way set up in the Federal statutes to wind up a corporation created by a Special Act of Congress, except perhaps by getting another Act of Congress . . ." (Official Transcript, pp. 21, 22, Hearing on Motion for Summary Judgment, May 11, 1954, *Landell et al.* v. *Northern Pacific Railway Co.*, 122 F. Supp. 253).

decision in the present case that laches may be used to fill an alleged lacuna in the statute books and as a substitute for the repeal or modification of a statute is a wholly novel and unconstitutional concept. The decision in the *Union Pacific* case that the provisions in a statute survive a corporate reorganization, should govern the present case. Enforcement of the statute will place the statutory assets of charter powers, franchise and right-of-way in the hands of the federal corporation, where by law they belong, or will otherwise afford protection to petitioners' current and existing fundamental rights.

b. Reappraisal of the present case in the light of the *Union Pacific* case demonstrates that the laches determination is without merit in law or in fact.

(1) The doctrine of laches is not applicable. According to the *Union Pacific* case, the right-of-way restrictions are continuously obligatory and the respondent can be compelled henceforth to observe them. In this respect the *Union Pacific* decision indicates that the present case is analagous to the cases holding that laches is not available as a bar to prosecute a defendant whose interest is founded upon violation of an outstanding statutory obligation, *Oregon & California Railroad Co.* v. *United States,* 238 U. S. 393, 427; and is not available as a bar to prevent the beneficiary of a statutory prohibition obtaining relief from a violation of the prohibition, *Ewert* v. *Bluejacket,* 259 U.S. 129, 138; and, since in the present case the defense of acquiescence was expressly disclaimed, laches is not available as a bar to prevent the owner to enjoin further infringement of an outstanding patent, *Menendez* v. *Holt,* 128 U.S. 514, 524, 525. In the present case the term of the outstanding grant is perpetual and the petitioners have a continuous pro rata property interest therein. Congress itself could not constitutionally erase their interest except for a public purpose and upon payment of just compensation. The refusals of Congress

to consent to the assignment of the federal corporation, to repeal the Act and to dissolve the federal corporation, preserves petitioners' rights in the federal grant and charter. It is beyond a court's jurisdiction to hold otherwise, whether directly, or indirectly by the self-imposed, discretionary rule of laches.

(2) The present case lacks the most essential ingredient of laches, namely, prejudice to respondent as a result of petitioners' delay in suing. *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488, 489.

Under the *Union Pacific* case the obligations, prohibitions and restrictions in the grant are enforceable at any time by the United States.

The alleged inaction of the petitioners has not and could not prejudice respondent's right, title and interest in the grant. Should the United States sue, laches would not prevent achievement of the same or even greater relief than that sought by the petitioners in the present case.

Respondent by its own actions has demonstrated its constant awareness of its title vulnerability. It has always known that at any time it may be compelled by the United States to retransfer the federally-granted main line of road back to the federal corporation and to obey the statutory prohibitions. It has always conducted its affairs and that of its subsidiary federal corporation on the basis that sometime there is bound to be a day of reckoning.

Respondent keeps the stocks, bonds and other securities of the federal corporation alive and uses them to preserve that corporation as an avenue of escape. Even since the entry of the summary judgment, it causes meetings of the federal corporation's stockholders to be held. Notices of these meetings are given to the petitioners by respondent's Secretary, who is also Secretary-Treasurer of the

federal corporation. If the federal corporation has no assets, who pays for these meetings and for what purpose? Why does Congress in statutes dealing with the Northern Pacific grant treat the federal corporation as owner and require title documents to be executed by it?

In the several mortgages placed by the respondent upon the right-of-way under the alleged authority of Wisconsin law, and without obtaining the consent of Congress, as required in section 10 of the grant, unique escape clauses are provided. Respondent reserves the discretionary right to retransfer the purportedly mortgaged right-of-way to a railroad corporation organized and existing under the laws of the United States. This right may be exercised without obtaining the consent of the mortgage trustee. The only corporation capable of being such transferee is the federal corporation.

Petitioners' failure to sue has never lulled respondent into a state of prejudice. It knows that the provisions in a statutory grant are obligatory until repealed and it has governed itself accordingly with respect to both the United States and the petitioners. One of its vice presidents testified before a Congressional Committee in 1926 that it "always" conducted itself in deference to the rights of the minority stockholders of the federal corporation.

(3) As respects the minority stockholders, the federal corporation is an empty "shell." As respects the federal Government, it is a living entity. Respondent's reason in the present case why the "old Railroad" is "still around" (supra, p. 12) is feigned. Its director and counsel in their testimony before the House Committee on the Judiciary stated the true reason, *supra*, p. 11. It is that neither the State of Wisconsin nor a court can divest the charter powers, franchise and right-of-way from the federal corporation and invest respondent with them, free from the restrictions, in the absence of enabling federal legislation. The complaint is founded upon this principle of

constitutional law. Its prayer for relief does not mention fraud. Its prayer, like that in the *Union Pacific* case, is for a judicial construction of the grant to ascertain the nature of the petitioners' and respondent's interests in the federally granted charter, franchise and right-of-way.

(4) If the case were based upon an ancient fraud, as the summary judgment opinion mistakenly asserts, it would be barred, not by laches, but by the statute of limitations. It is extremely remarkable that this fact, pointed out to the District Court on numerous occasions, is not mentioned in the decision. The failure of the decision to separate the salient fundamentals in the complaint from what is historical, may be due, in part, to the prolixity of the pleading.

The misconception of the cause of action stated in the complaint, is further evidenced by what occurred at the argument before the Court of Appeals on the first appeal and the statement concerning failure of proof of fraud in the second, short, per curiam opinion of that court.

At the argument, the presiding judge stated that petitioners' counsel should concentrate on meeting the heavy burden of establishing respondent's fraud and cease from arguing that the cause of action centered about the nature of the title interest of the petitioners' and respondent in the charter, franchises and right-of-way of the federal corporation and that these were not assignable without the consent of Congress and of the stockholders.

The per curiam opinion in the second appeal, 238 F. 2d 30, states that the merits of the appeal are based upon alleged flaws in the findings of fraud upon which the original summary judgment was based; that those questions are no longer open; that a judgment in the posture of this one may be attacked for fraud in its procurement and that no fact remotely suggesting any such infirmity in the present judgment appears here.

We suggest with all due respect, that these occurrences indicate a too hasty reliance upon the incorrect interpretation of the complaint by the District Court. This Court's decision in the *Union Pacific* case demonstrates that petitioners do not have the heavy burden of establishing the elements of fraud committed long ago and far away. They are entitled to prove the present nature of the petitioners' and respondent's interests under an operative statute in the right-of-way, and that the respondent is bound by the obligations in the grant.

4. Importance of the case. Mr. Justice Greenberg of the Supreme Court of the State of New York has pointed out that, worse than delay in the administration of justice is the summary method of disposing of business, where the court subordinates keeping up with justice, to keeping up with its calendar. "Haste is a prolific parent of error and injustice." (*Myth and Reality About the Courts, Judges and Justice,* 12 The Record of the Association of the Bar of the City of New York, May 1957, pp. 246, 252). Judge Learned Hand has adverted to this same danger. *Bozant* v. *Bank of New York,* 2 Cir., 1946, 156 F. 2d 787, 790. See *Arnstein* v. *Porter,* 2 Cir., 1946, 154 F. 2d 464, 471, 474.

Respondent is today violating the restriction in the grant, thereby depriving petitioners of their fundamental rights as stockholders in an existing corporation. This is not just an old wrong, it is a current and continuing wrong. Upon the record in this case there was no jurisdiction in the courts to interfere with and nullify the plain commands of an operative statute. The courts had no legal power to erase the minority interest. If a summary method was to be used in disposing of this case, respondent's motion for dismissal should have been rejected by the court *sua sponte* on the ground of lack of jurisdiction. Non-use or non-enforcement of a statute does not result in its modification or repeal and a court

has no authority to determine otherwise. "The repeal of laws is as much a legislative function as their enactment.[10]" *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 114.

According to the present decision, the federal corporation's charter and the rights of the minority have disappeared "in the dark backward and absym of time". But, as shown by the federal corporation's stockholders meetings since entry of the judgment, the corporation still flourishes in a kind of twilight zone for the sole use and profit of its 97% stockholder. We believe that the situation calls for the exercise of this Court's power in the interests of law, consistency and justice. Citizens holding stock in an existing federal corporation are entitled to a day in court to ascertain the present assets of the corporation and whether its 97% stockholder is entitled to their free enjoyment.

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully requested that rehearing be granted and that, upon such rehearing, writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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May, 1957.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the rules of this Court.

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